STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re: **Request for Regulatory Determination filed by CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION regarding alleged underground regulations of the STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION used to determine if the Commission has jurisdiction over power facilities[1]**	**1993 OAL Determination No. 1** **[Docket No. 90-015]** **April 6, 1993** **Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: JOHN D. SMITH, Deputy Director

HERBERT F. BOLZ,[2] Supervising Attorney
Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law finds:

(1) that the alleged Commission *practice* of applying the Warren-Alquist Energy Resources Conservation and Development Act to determine jurisdiction on a case-by-case basis is not itself a "regulation" that must be adopted pursuant to the Administrative Procedure Act, and

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(2) that two of eight *interpretations* of the Act allegedly made by the Energy Commission regarding its jurisdiction are not "regulations" that must be adopted pursuant to the Administrative Procedure Act, but that

(3) the remaining six challenged *interpretations* are indeed "regulations" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

THE ISSUES PRESENTED[3]

The Office of Administrative Law ("OAL") has been asked to determine[4] whether certain interpretations and a practice allegedly used by the State Energy Resources Conservation and Development Commission ("Energy Commission," "Commission," or "CEC") pertaining to the determination of its jurisdiction over power facilities are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA")[5].

THE DECISION[6,7,8,9]

The Office of Administrative Law finds that:

(A) the Energy Commission's quasi-legislative enactments are generally subject to the APA;

(B) the Energy Commission's determination of its jurisdiction on a case-by-case basis through application of the Warren-Alquist Energy Resources Conservation and Development Act and duly adopted regulations is not quasi-legislative in nature, and thus does not violate the APA;

(C) of the eight interpretations of the Warren-Alquist Energy Resources Conservation and Development Act listed below (pp. 7-8), nos. 2 and 5 do not constitute "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);

(D) of the eight interpretations listed below (pp. 7-8), nos. 1, 3, 4, 6, 7 and 8 are "regulations;"

(E) these "regulations" (nos. 1, 3, 4, 6, 7 and 8) are not exempt from adoption pursuant to the Administrative Procedure Act;

(F) these "regulations" violate Government Code section 11347.5, subdivision (a).[10]

REASONS FOR DECISION

I. THE APA AND REGULATORY DETERMINATIONS BY OAL

In *Grier v. Kizer*, the California Court of Appeal described the APA and OAL's role in its enforcement as follows:

> "The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) . . . The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).
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> "In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.][11]

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. That section, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted

pursuant to the APA. The section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342. Subsection (b) of section 11347.5 states as follows:

> "If [OAL] is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to [the APA, OAL] may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

These provisions thus authorize OAL to determine whether a challenged rule is or is not a "regulation" that must be adopted pursuant to the APA. Notably, the provisions do not authorize OAL to prevent the use of a rule or policy declared to be an invalid "regulation" in violation of section 11347.5, or to impose penalties upon such use. Such authority rests with the courts.

II. THE RULEMAKING AGENCY INVOLVED HERE; ITS AUTHORITY; BACKGROUND OF THIS REQUEST FOR DETERMINATION

The Rulemaking Agency Named in this Proceeding

The State Energy Resources Conservation and Development Commission ("Commission" or "the Energy Commission") was created by the Warren-Alquist Energy Resources Conservation and Development Act ("Warren-Alquist Act") in 1974.[12]

> ". . . [T]he Warren-Alquist Act charged the Energy Commission with the responsibility for establishing a state energy policy and for insuring adequate electricity supplies with minimum adverse effect on the state economy and environment. . . . Among its many duties, the Energy Commission is vested with exclusive authority to

certify sites and related facilities. . . ." [Citations omitted.][13]

Authority [14]

The Energy Commission has been granted general rulemaking authority by Public Resources Code section 25213, which states in part:

> "The commission shall adopt rules and regulations, as necessary, to carry out the provisions of [Division 15 - "Energy Conservation and Development"] in conformity with the provisions of [the APA]." (Emphasis added.)

Within Division 15, Chapter 6 ("Power Facility and Site Certification"), section 25541.5 of the Public Resources Code states in part:

> "The commission shall . . . adopt regulations pursuant to this chapter which comply with all requirements of this chapter and Section 21080.5,[15] and shall submit a regulatory program to the Secretary of the Resources Agency for certification pursuant to Section 21080.5." (Emphasis added.)

The Request for Determination

This Request for Determination, filed by the California Municipal Utilities Association ("CMUA") in May 1990, initially asks OAL to find that the Energy Commission's practice of determining its jurisdiction for certification of power facilities through case-by-case adjudication is itself a "regulation" subject to the requirements of the Administrative Procedure Act. Alternatively, CMUA asks OAL to find that the following enumerated interpretations of the Warren-Alquist Energy Resources Conservation and Development Act, allegedly reflected in settlement agreements, staff statements, or adjudicatory decisions, are "regulations" subject to the APA:

1. "A utility must obtain certification (or exemption) from [the Energy Commission] before beginning construction of a thermal powerplant with a generating capacity of 50 MW [megawatts] or more. . . ."

2. "Three separately owned, but functionally related, 42-MW co-generation facilities, each below the Commission's jurisdictional limit, constitute a single 126 MW powerplant because the three projects were conceived and developed as an integrated whole, built on contiguous sites subject to coordinated maintenance schedules, and managed by one entity. . . ."

3. "Separate facilities conceived and developed as an integrated whole, managed by one entity, owned by one utility and built on contiguous sites constitute a single thermal powerplant . . . ."

4. "When a plant is under the [Energy Commission's] jurisdiction, significant changes to that plant are logically within the Commission's jurisdiction, even if the changes do not result in an increase of 50 MW or more. . . ."

5. "Although the Harbor Generating Station was built, owned, and continuously operated by a single utility, all units occupy contiguous sites (some housed in the same building) and are subject to coordinated maintenance schedules, the Harbor will not be deemed a single powerplant in order to measure increased generating capacity to determine jurisdiction under Public Resources Code section 25123 . . . ."

6. "The increase in generating capacity of the existing facility will be determined solely with reference to the unit or units being modified without regard to the total existing capacity of a multi-unit facility . . . ."

7. "The amount of generating capacity being retired as a result of a facility modification will not be subtracted from the generating capacity of the facility after modification. Thus, if a facility has a <u>total</u> generating capacity of 234 MW prior to modification and a <u>total</u> generating capacity of 240 MW after modification, the <u>increase</u> in generating capacity of the facility is not 6 MW, it is 240 MW . . . ."

8. "The definition of modification in section 25123 only applies to improvements, alterations, or replacements with equipment of like

nature. . . ."

In a letter dated May 18, 1990, the Energy Commission urged OAL to refuse to accept the request on the ground that it failed to meet the filing requirements stated in Title 1, California Code of Regulations ("CCR"), section 122. In a letter dated May 21, 1990, OAL declined to follow the Energy Commission's suggestion, concluding that the request did indeed satisfy the filing criteria specified in the CCR.

On August 31, 1990, the Requester submitted additional material as a public comment. On January 25, 1991, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,[16] along with a notice inviting public comment. Another public comment, dated February 22, 1991, was submitted by the Department of Water and Power of the City of Los Angeles ("DWP"). The Commission submitted its Response to the Request for Determination ("Response") on March 11, 1991.

While this Request for Determination was pending before OAL, related administrative and judicial proceedings were unfolding. The final Energy Commission decision in the hotly contested "Harbor Generating Station Repowering Project" was issued in July 1990. The DWP promptly filed suit against the Energy Commission in Los Angeles County Superior Court, seeking a writ of mandate. In November 1990, the Superior Court issued the writ of mandate, directing the Energy Commission to vacate the July 1990 administrative decision. The Energy Commission appealed the trial court decision. In December 1991, the California Court of Appeal upheld the trial court decision in a published opinion, *Department of Water and Power, City of Los Angeles v. State of California Energy Resources Conservation and Development Commission* (hereafter referred to as "*Department of Water and Power*").[17]

In short, the Court of Appeal held that the interpretation of the Warren-Alquist Act upon which the Energy Commission based its assertion of jurisdiction of the Harbor Generating Station project could not be reconciled with the statute. The Request for Determination filed with OAL raised a closely related but distinct issue--whether or not several of the Energy Commission interpretations of the statute were rules that were legally invalid because they had not been adopted pursuant to the APA.

It is possible for an agency rule to be legally invalid on more than one ground, e.g., the rule may not only be an underground regulation, but also inconsistent with the statute it purports to interpret.

The Commission admits that it has promulgated a regulation, pursuant to the APA, that defines "generating capacity" for purposes of determining the need for certification.[18] The Commission, however, denies the adoption of any other regulations which implement, interpret, or make specific Public Resources Code section 25500."[19] Instead, the Commission claims that it has determined the jurisdictional issue under section 25500 on an "ad hoc" basis, through the adjudicative process.

II. DISCUSSION

The Energy Commission and Its Jurisdiction

The *Department of Water and Power* Court discussed the jurisdiction of the Energy Commission as follows.

> "In 1974, the Legislature enacted the Warren-Alquist State Energy Resources Conservation and Development Act (Pub. Resources Code, sec. 25000 et seq., hereafter the Act).[20] The Act states that 'electrical energy is essential to the health, safety and welfare of the people of this state and to the state economy, and that it is the responsibility of state government to ensure that a reliable supply of electrical energy is maintained at a level consistent with the need for such energy for protection of public health and safety, for promotion of the general welfare, and for environmental quality protection.' (Sec. 25001.) The Act also enunciates a policy and intent to 'establish and consolidate the state's responsibility for energy resources, for encouraging, developing, and coordinating research and development into energy supply and demand problems, and for regulating electrical generating and related transmission facilities.' (Sec. 25006.)
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> "The Act established the Energy Commission. (Sec. 25200.) The Energy Commission's five members[21] are responsible

for establishing the state's energy policy and 'insuring adequate electricity supplies with minimum adverse effect on the state economy and environment. [Citations.]' (*Public Utilities Com. v. Energy Resources Conservation & Dev. Com.* (1984) 150 Cal.App.3d 437, 440, 197 Cal.Rptr. 866.)

"The Energy Commission's certification jurisdiction is set forth in section 25500. After the effective date of the Act, 'no construction of any facility or modification of any existing facility shall be commenced without first obtaining certification for any such site and related facility by the commission, as prescribed in [the Act].' (Sec. 25500, [emphasis] added.) Section 25500 supplies the Energy Commission with the exclusive power to certify all 'sites'[22] and 'related facilities,'[23] 'whether a new site and related facility or a change or addition to an existing facility.' (Sec. 25500.)

"Section 25500 [requires the Energy Commission's certification if a project constitutes] either the 'construction' or the 'modification' of a facility. (For the sake of convenience, we hereafter use the shorthand terms 'construction jurisdiction' and 'modification jurisdiction.')

"The Act supplies definitions for both 'construction' and 'modification.' As used in the Act, '"Construction" means onsite work to install permanent equipment or structure for any facility.' (Sec. 25105.) The term 'facility' includes a '"thermal powerplant" . . . with a generating capacity of 50 megawatts or more . . . ." (Secs. 25120, [emphasis] added; 25110.)[24]

"The term 'modification' as used in the Act means 'any alteration, replacement, or improvement of equipment that results in a 50-megawatt or more increase in the electric generating capacity of an existing thermal powerplant . . . .' (Sec. 25123, [emphasis] added.) [Brackets in original; underlined brackets added.][25]

The *Department of Water and Power* Court held that the Energy Commission does not have modification jurisdiction "over any alteration, replacement, or improvement of equipment that does not result in a 50-megawatt increase in an existing station's generating capacity."[26] The court explained that the term "facility" as used in sections 25500 and 25123 refers to the "entirety of the existing powerplants at the Harbor Generating Station [a station owned by the Department of Water and Power of the City of Los Angeles, which encompasses a 20-acre site containing nine electrical generating units and auxiliary facilities[27]]."[28]

> "We hold that 'facility' in sections 25500 and 25123, as the term applies here, collectively refers to the entirety of the existing powerplants at the Harbor Generating Station. The plain, common sense meaning of sections 25500 and 25123 is that any alteration, replacement, or improvement of equipment that results in a 50-megawatt net increase in an existing station's total generating capacity is subject to the Energy Commission's certification jurisdiction. Nothing in the statutes authorizes the Energy Commission to ignore a station's former generating capacity in making the section 25123 increase calculation."[29]

The court also held that the Commission's construction jurisdiction applies only to new, not existing sites.

> "Turning to the words of the statute, we find that the Legislature has vested the Energy Commission with certification jurisdiction over the 'construction of any facility' with a generating capacity of 50 megawatts or more. (Secs. 25120, 25500.) The Act defines 'construction' as 'onsite work to install permanent equipment or structure for any facility.'" (Sec. 25105.)
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> "* * * *
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> "We hold that 'construction' as used in section 25500 refers only to new, not existing, sites." [30]

Key Issues Regarding the Determination

A. **Whether the APA is generally applicable to the Energy Commission's quasi-legislative enactments.**

B. **Whether the challenged rules reflect the exercise of quasi-legislative power.**

C. **Whether the challenged practice and interpretations identified in the Request for Determination constitute "regulations" within the meaning of the key provision of Government Code section 11342(b).**

D. **Whether the challenged interpretations found to constitute "regulations" are exempted or excluded by statute from compliance with APA requirements.**

A.

The APA is generally applicable to the Energy Commission's quasi-legislative enactments.

Government Code section 11000 states in part:

> "As used in this title [Title 2, 'Government of the State of California'] 'state agency' includes every state office, officer, department, division, bureau, board, and commission." (Emphasis added.)

This statutory definition applies to the APA: i.e., it helps us determine whether or not a particular "state agency" is subject to APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also found in Title 2 of the Government Code: to be precise, it is Chapter 3.5 of Part 1 of Division 3.

The Energy Commission, a "state . . . commission," is clearly a "state

agency" as that term is defined in Government Code section 11000.

The APA somewhat narrows the broad definition of "state agency" given in Government Code section 11000. In Government Code section 11342, subdivision (b), the APA provides that the term "state agency" applies to all state agencies, except those in the "judicial or legislative departments."[31] Since the Commission is not in the judicial or legislative branch of state government, we conclude that APA rulemaking requirements generally apply to its quasi-legislative enactments.[32]

Moreover, Public Resources Code section 25213 states in part:

> "The commission shall adopt rules and regulations, as necessary, to carry out the provisions of [Division 15 - 'Energy Conservation and Development'] in conformity with the provisions of [the APA]." [Emphasis added.]

B.

The challenged rules reflect the exercise of quasi-legislative power.

Though conceding that its quasi-legislative enactments are subject to the APA,[33] the Commission in substance contends that the challenged rules are not quasi-legislature in nature. It argues that the practice and interpretations challenged by the requester are "jurisdictional determinations on a case-by-case basis, using adjudicatory procedures to determine the facts of each case and interpreting its enabling statute in light of those facts"[34] that need not be adopted through rulemaking.

To understand whether California law permits the Energy Commission to make jurisdictional determinations through adjudication rather than through rulemaking, it is useful to recall some background information about administrative law. "Most agencies on either the state or federal level now use two primary vehicles for announcing agency policy, a rulemaking or an adjudication."[35] Almost uniformly, commentators suggest that announcement of agency policy through rulemaking is the preferred method.[36] Though rulemaking is preferred for a large number of reasons, discussing these reasons in detail is beyond the scope of this

Determination. In brief, key reasons include: (1) it is better to involve the public in policy formulation because this furthers democratic values, provides the agency with pertinent information it might otherwise not be aware of, etc.; (2) rules published in the format of codified regulations are much easier to locate and understand, often decreasing the need for persons to hire a lawyer to ascertain their legal obligations; and (3) the agency is legally bound by duly adopted regulations and thus cannot suddenly change the rules of the game.

Administrative law systems are statutory in nature. The federal administrative law system is entirely separate and distinct from the California administrative law system. According to the California Supreme Court in the watershed case *Armistead v. State Personnel Board*, the California Legislature intended to subject a much greater variety of agency rules to formal rulemaking requirements than Congress intended when enacting the federal APA. For instance, the federal APA exempts "interpretative guidelines" from notice and comment requirements. Title 5, U.S.C., section 553(b) provides in part:

> "Except when notice and hearing is required by statute, this subsection does not apply--
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> > (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; . " (Emphasis added.)

In sharp contrast, the California Legislature clearly intended that there be no exemption for interpretive guidelines. Exempting interpretive guidelines was--and is--a clear policy alternative in the structuring of an administrative law system. In enacting the California APA in 1947, however, the Legislature rejected a proposal to exempt "any interpretative rule or any rule relating to public property, public loans, public grants, public contracts" (emphasis added) from APA notice and hearing requirements.[37] It therefore seems that the 1947 Legislature considered and rejected the idea of following the federal example of exempting interpretive guidelines from notice and comment requirements.

A key question under any administrative law system is the extent to which an agency has discretion to choose the method of announcing agency

policy.

Agency decisionmaking by rulemaking and by adjudication (both formal and informal), in the context of the federal administrative law system, has been succinctly described as follows:

> "[T]here are essentially three components to agency decisionmaking: rulemaking, adjudication and informal action. Agency procedures normally vary depending on the type of decisionmaking in which the agency is engaged.
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> **"[a] Rulemaking**
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> "When an agency seeks to exercise its legislative functions by making rules, the process normally used is a relatively simple system known as notice and comment, or informal rulemaking.[fn] This process requires the agency (i) to give the general public notification that a rule is being contemplated and the language or a general description of the proposed rule, and (ii) to invite any interested person to submit comments on the proposed rule. The agency considers the comments and then promulgates a final rule. There are some limited instances on the federal level when rules may be promulgated only after an agency follows the adjudication procedures described in the next paragraph (so-called formal rulemaking) and instances when an agency's enabling act requires procedures somewhere between informal and formal rulemaking. This in-between procedure is usually referred to as hybrid rulemaking.
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> **"[b] Adjudication**
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> "When the agency exercises its judicial function by engaging in adjudication, it uses a process that is very much like a civil bench trial in a judicial system. These proceedings, while subject to some variants on the state and federal level depending on the agency and the matter being adjudicated, permit an oral hearing with direct and cross-examination,

testimony under oath, the development of a complete and exclusive record on which the decision is to be based, and the presence of a neutral presiding officer (known on the federal level as an administrative law judge). Court and agency procedures are not identical, of course. Unlike civil trials, most agencies do not use formal rules of evidence or permit the elaborate discovery allowed under, for example, the Federal Rules of Civil Procedure. Elaborate pre-trial and post-trial procedures are rare and juries are unheard of. Nonetheless, the similarities between agency adjudication and civil litigation are still far greater than the differences.

"[c] **Informal Agency Action**

"Procedures used when an agency engages in informal action (sometimes referred to as informal adjudication because most of these decisions involve individual cases rather than generic policymaking) vary considerably. Minimal procedures include merely giving reasons for a decision--as, for example, when a federal agency denies certain types of applications for benefits. Other actions can require the giving of notice and some opportunity to comment in writing, or providing an oral hearing for aggrieved persons. While procedures for rulemaking and formal adjudication are often tightly controlled by either an enabling act or the state or federal APA, procedures governing informal agency action are normally to be found in the procedural rules of an agency." [Emphasis and brackets in original; except, underlined brackets added].[38]

California's administrative law system is in some ways quite simple. The definition of "regulation" is very broad. All "regulations" (all rules that reflect the exercise of quasi-legislative power) are subject to public notice and comment requirements, except as expressly provided by statute. (Gov. Code sec. 11346.)

By contrast, as noted above, federal agencies have the benefit of a number of broad statutory exemptions from notice and comment rulemaking requirements, most notably the interpretive guideline and policy statements exceptions. In addition, as correctly pointed out by the Commission, federal case law has

provided federal agencies with an additional measure of flexibility. Specifically, in *SEC v. Chenery Corporation* (1947) the U.S. Supreme Court, interpreting federal statutes, held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[39] The Commission argues that the holding of this federal case interpreting federal statutes has been incorporated into California law by virtue of the fact the holding has been quoted in California case law.

OAL must reject this argument. California state agencies are creatures of statute. The California Legislature has granted them the power to issue rules interpreting statutes on the condition that specified procedures be followed, most notably public notice and comment. California agencies do not generally have the discretion to announce rules of general application through either rulemaking or administrative adjudication. True, it would be helpful from the agency perspective to have the authority to issue precedent decisions. A proposed APA amendment which would expressly confer such authority upon agencies with quasi-judicial power is presently under review by the California Law Revision Commission; if finally approved by the Commission, it will be introduced into the Legislature. At this writing, however, only a very small number of agencies have express statutory authority to issue precedent opinions. Absent express statutory authority, California agencies do not generally have the power to create new law through administrative adjudication. In other words, the *Chenery* doctrine does not generally apply in California.[40]

Citing two appellate opinions, the Commission argues that *Chenery* doctrine does apply in California. We cannot accept that argument, for two reasons. First, while it is true the *Chenery* holding has been quoted in several California cases, application of the rule was not necessary to resolve the issues before the respective courts. The judicial statements relied upon by the Commission are dicta. Second, the cases relied upon by the Commission did not deal with the question of how Government Code section 11346 applies to the *Chenery* question. Section 11346 requires that APA exceptions be both (1) in statute and (2) express. Where is the statute that expressly states that California agencies in general can make new law by either rulemaking or adjudication?

The first case relied upon by the Commission is *ALRB v. California Coastal Farms* ("*ALRB*") (1982) 31 Cal.3d 469, 478, 183 Cal.Rptr. 231, 235. We cannot accept the Commission's interpretation of this case; it does not harmonize with

the facts of the case or with the Court's characterization of the issue before the court. According to the *ALRB* Court, the "sole issue is: Was the trial court's grant of strike access an abuse of discretion?"[41] According to the Court, ". . . we do not here consider the ultimate power of the ALRB to permit--by adjudication or rulemaking--union access to the employer's property in order to talk to nonstriking workers during an economic strike. . . . The issue, in short ,is one of trial court power, not agency power." It could be argued that due to its unique statute (telling it to generally follow National Labor Relations Board "precedents") and applicable court decisions,the ALRB is in effect free to announce policy either through rulemaking or administrative adjudication. Assuming arguendo that this is the case, this proposition is of no assistance to the Energy Commission.

The second case relied upon by the Commission is *Mein v. San Francisco Bay Cons. & Dev.* (1990) 218 Cal.App.3d 727, 734. Close reading of this case reveals that the Court rejected an argument that the agency rule violated the APA on two grounds. (The rule was that housing is not a "water-oriented use" of the shoreline.) The two grounds were: (1) a validly adopted enactment (the San Francisco Bay Plan) already contained the challenged rule and (2) the agency need not amend the law each time it decides an individual application.

Several points must be made about *Mein*.

(1) If the challenged rule was already contained in a validly adopted enactment, the court's conclusion to this effect was sufficient to resolve the controversy before the court: there was no need to reach the rulemaking v. adjudication issue. The court's opinion on this secondary rulemaking/adjudication issue would appear to be dictum.

(2) The court's statement about how the law need not be amended in order to resolve each individual application is confusing. Obviously, it is not necessary to adopt a new regulation each time an agency applies an existing regulation. Possibly the court was blurring the distinction between simple application of a validly adopted legal provision on the one hand, and the act of interpreting an existing law in such a way as to in effect create new law, on the other hand.

(3) The court does not refer to Government Code section 11346 or develop a rationale for explaining how that code section can be read to permit

creation of an APA exception covering rules developed through administrative adjudication.

(4) The recent case *State Water Resources Control Board v. Office of Administrative Law* ("*SWRCB*"), concluded that certain regional water quality plans violated the APA. In the determination proceeding which preceded the judicial opinion, the defendant in *Mein*, the San Francisco Bay Conservation and Development Commission ("BCDC") submitted a comment, arguing that OAL should avoid finding that the regional plan which was the subject of the request for determination violated Government Code section 11347.5, because this conclusion would likely mean that BCDC's Bay Plan also violated the APA. OAL found that the regional plan violated the APA. The trial and appellate courts concurred. Where does this leave the Bay Plan? Of course, OAL expresses no opinion on the legality of the Bay Plan; however, in light of BCDC's expressed concerns, a question does arise as to the viability of an appellate opinion which may be inconsistent with the more recent *SWRCB* case.

Since the term "quasi-legislative" is not defined in the California APA,[42] we look to the judicial definition of "quasi-legislative" to determine whether the challenged practice and interpretations reflect the exercise of quasi-legislative power. The California Supreme Court, in *Pacific Legal Foundation v. California Coastal Commission*,[43] held that a quasi-legislative action is "a general policy intended to govern future . . . decisions, rather than the application of rules to the peculiar facts of an individual case."[44]

The application of rules to the particular facts of an individual case may occur in a formal adjudication or in an informal agency action. Does this mean that in an adjudication or an informal agency action, a rule of general application may be created and applied in the same instance (common law rulemaking)? No. Under Government Code section 11346, rules of general application, even those that interpret[45] statutory law, must be announced through rulemaking. A noteworthy feature of the California system is that an agency interpretation of a statute is "quasi-legislative," while under the federal system it is generally not "quasi-legislative."

The Requester contends that the Energy Commission's approach to determining jurisdiction on a case-by-case basis is itself a rule of general application subject to the requirements of the APA. In other words, the Requester views the Energy Commission's approach as a "general policy intended to govern future decisions." We do not.

The Energy Commission denies the existence of a rule specifying case-by-case adjudication for establishing the extent of its jurisdiction over energy facilities.[46] It admits, however, that it currently administers "on a case-by-case basis, the legislative command that 'no construction of any [thermal powerplant with capacity of 50 MW or more] or modification of an existing facility shall be commenced' without first obtaining a license therefor from the Energy Commission."[47],[48] The Energy Commission states, "The fact that the Commission has applied statutes and regulations on a case-by-case basis in some cases does not amount to a rule that the Commission will always proceed in that manner."[49]

We find that the Energy Commission's admitted case-by-case adjudication of the jurisdictional issue applying statutes and duly adopted regulations is not a quasi-legislative action. The Requester is complaining in effect that the Energy Commission has a "rule" stating that "there are no rules." The absence of rules is not a general policy governing future decisions; expressed recognition of the absence of rules is a mere statement of fact. The lack of rules was not created by a "rule."[50] Likewise, the Energy Commission's case-by-case adjudication of the jurisdictional issue is not dictated by a general policy to that effect. Rather, that method of determining jurisdiction occurs in the absence of general policies governing the implementation and interpretation of Public Resources Code section 25500. The Energy Commission's ad hoc adjudication of jurisdiction does not constitute a general policy affecting future decision - i.e., a quasi-legislative enactment.[51]

The Energy Commission suggests that the Requester's real concern is that the Commission has not adopted "regulations," underground or otherwise, in favor of the Requester in applying Public Resources Code section 25500.[52] Insofar as that allegation has merit, the Requester's efforts would be better directed to a petition to the Energy Commission to adopt regulations pursuant to Government Code section 11347. Should such a petition be denied, the Requester could seek redress in the courts.

C.

Three of the challenged rules do not constitute "regulations" within the meaning of the key provision of Government Code section 11342(b), six of the challenged rules are "regulations."

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ["]regulation["] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

In *Grier v. Kizer*,[53] the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

> First, is the challenged rule either
>
> o a rule or standard of general application or

- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or

- govern the agency's procedure[54]?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.][55]

A. Are the Challenged Rules Standards of General Application or Modifications or Supplements to Such Standards?

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order,[56] for instance, Medi-Cal patients or all physicians who serve Medi-Cal patients.

The Energy Commission contends that the enumerated rules do not have general application, but rather were derived from settlement agreements, staff statements, briefs, or adjudicatory decisions pertaining to specific parties. We shall address this argument in the following analysis of the enumerated challenged rules (Rules 1-8):

Rule 1:

> "A utility must obtain certification (or exemption) from the California Energy Commission before beginning construction of a thermal powerplant with a generating capacity of 50 MW or more. . . ."

The Requester refers to the stipulation entered into between the Energy Commission and the Northern California Power Agency ("NCPA") in NCPA's "Petition for Declaration re Jurisdiction" as the source of the challenged rule. In reviewing that petition, we note that the parties stipulated that "the Energy Commission has siting jurisdiction over thermal power plants constructed and operated by NCPA in California." While the stipulation is specific to the parties, the challenged rule (as stated) is not. It applies to all utilities seeking to construct power facilities in the state. The rule, therefore, is one of general application.

Rule 2:

> "Three separately owned, but functionally related, 42-MW co-generation facilities, each below the Commission's jurisdictional limit, constitute a single 126 MW powerplant because the three projects were conceived and developed as an integrated whole, built on contiguous sites subject to coordinated maintenance schedules, and managed by one entity. . . ."

This rule appears to be a tailored version of the more generic Rule 3. According to the Requester, it stemmed from a May 20, 1986 memorandum from William M. Chamberlain, the Energy Commission's General Counsel, to the Commissioners regarding the Energy Commission's jurisdiction over the Kern Island Cogeneration Project. Because it relates to the aggregate of specific numbers of megawatts (3 x 42 = 126), it is too restrictive a rule to have general application. The rule applies specifically to the Kern Island power facility. The fact that the stated rule may also apply to power facilities that coincidentally have the same physical makeup and generating capacities does not give the rule general application.

Rule 3:

> "Separate facilities conceived and developed as an integrated whole, managed by one entity, owned by one utility and build on contiguous sites constitute a single thermal powerplant . . . ."

The Requester cites "Staff's Statement of Position Alleging Jurisdiction in the Matter of Luz Engineering Corporation's Solar/Gas Project at Kramer Junction" and the "Commission Order in the Matter of City of Santa Clara's Gianera Street Peaking Power Plant" as the basis for the rule. Regardless of the fact that the rule was formulated from a staff statement and Commission order arising from adjudication of the jurisdictional issue involving particular energy facilities, the rule (as stated) nonetheless applies to all power facilities in the state and thus has general applicability.

Rule 4:

> "When a plant is under the Energy Commission's jurisdiction, significant changes to that plant are logically within the Commission's jurisdiction, even if the changes do not result in an increase of 50 MW or more. . . ."

This rule was quoted (almost verbatim) from the "Staff Opposition to NCPA's Petition for Declaration re Jurisdiction." While the staff's position was stated with respect to that particular adjudicative action, the general language of the rule applies to all existing power facilities in the state and thus has general applicability.

Rules 5-8:

> "Although the Harbor Generating Station was built, owned, and continuously operated by a single utility, all units occupy contiguous sites (some housed in the same building) and are subject to coordinated maintenance schedules, the Harbor will not be deemed a single powerplant in order to measure increased generating capacity to determine jurisdiction under Public Resources Code section 25123 . . . ."

> "The increase in generating capacity of the existing facility will be determined solely with reference to the unit or units being modified

without regard to the total existing capacity of a multi-unit facility . . . ."

"The amount of generating capacity being retired as a result of a facility modification will not be subtracted from the generating capacity of the facility after modification. Thus, if a facility has a total generating capacity of 234 MW prior to modification and a total generating capacity of 240 MW after modification, the increase in generating capacity of the facility is not 6 MW, it is 240 MW . . . ."

"The definition of modification in section 25123 only applies to improvements, alterations, or replacements with equipment of like nature. . . ."

The Requester alleges that these rules were "articulated as a basis of jurisdiction in the pending Harbor Generating Station Repowering Case."[57] In effect, the Requester asserts that the Energy Commission has conducted rulemaking through adjudication.

The distinction between rulemaking and adjudication, and the interplay between the two processes have been discussed as follows:

"Perhaps administrative law's most fundamental distinction is between adjudication and rulemaking. Nonetheless, while adjudication is primarily concerned with the resolution of individual rights and duties, it shares with rulemaking a basic law giving function. Indeed, legal theorist H. L. A. Hart wrote about judicial adjudication: 'In a system where stare decisis is firmly acknowledged, this function of the courts is very like the exercise of delegated rulemaking powers by an administrative body.' H. L. A. Hart, The Concept of Law, 132 (1961).

"Administrative agencies evolve the law through adjudication in a 'common law manner' in the same way as courts. Thus there are only two methods by which an agency may formulate policy or law if it wishes that policy to have effect: rulemaking and adjudication that create something like precedent.

> " . . . [I]t is difficult to develop a clean distinction between the two processes." [Emphasis added.][58]

In arguing that no rules of general application were generated from the "Final Commission Decision" in the Harbor Project adjudication,[59] the Energy Commission states on pages 9-10 of its Response:

> "This was the first case in which the Commission had ever addressed questions regarding the application of Public Resources Code sections 25500, 25120, and 25110 to a repowering proposal. These alleged 'rules' appear nowhere in the Commission's Harbor Decision. . . . The Commission plainly was not engaged in the promulgation of rules of general application. The Commission's Decision discusses LADWP's legal arguments in light of the extensive evidentiary record the Commission compiled, but the Decision specifically declares that the ruling in this case of first impression establishes no precedent with respect to future cases." [Citation omitted; emphasis added.]

DWP, in its public comment, provides a contrary view. It states:

> "The Harbor Project was not a case with 'unique' issues of first impression. Each time a new powerplant is built or a powerplant is changed, the CEC must calculate and/or review the generating capacity of an individual unit and/or the entire facility. The only unique feature to this case was that the Department refused to be intimidated and forced the CEC to make a written (appealable) ruling. . . .
>
> "With the facts not in dispute, the CEC then proceeded to make a series of rules of general application which would insure jurisdiction. The fact that those rules were developed and announced in a particular case does not diminish their status as underground rules of general application. Any utility observing the proceeding, would reasonably believe that these 'new underground rules' will apply equally to any of their projects. . . .
>
> " . . . The CEC makes the absurd claim that the rationale of its decision 'will have no binding legal precedent upon future cases'

> and is only limited to the particular facts . . . . The entire section of the opinion interpreting the Warren-Alquist Act is framed in terms of general conclusions and rules which would be applicable to any utility which was modifying, altering or replacing equipment in connection with a repowering project. Whether the CEC may change its mind with respect [to] the rationale of its decision in the future is beside the point. The decision states the CEC's present position as to these jurisdictional issues. It is clear that the Decision will be used as precedent, in fact, if not in law. The rules set forth in the Decision are, in effect, regulations, and as such they are subject to the Administrative Procedure Act . . . . [Footnote omitted.]"[60]

Recognition of the possible existence of "some" Energy Commission policy on the issue of jurisdiction was reflected in the Superior Court opinion in *Department of Water and Power*. On page seven of its decision, the trial court stated the following about the "Final Commission Decision" in the Harbor Project adjudication:

> "The Commission decision seems based upon some policy imperative outside the confines of the Warren-Alquist Act to the effect that the Commission ought to have jurisdiction over all equipment replacement projects involving equipment having a capacity of 50 megawatts or more. [Emphasis added.][61]

The Energy Commission also argues that, if OAL finds some basis for the Requester's claims as to alleged Rules 5-8, OAL should defer making any conclusions as to those rules. The Energy Commission contended that the then pending appeal of the Superior Court order which determined that the Energy Commission lacks jurisdiction in the Harbor Project

> ". . . renders moot much of [the Requester's] petition to OAL because either the appellate courts will agree with LADWP (in which case the Commission certainly would not adopt regulations inconsistent with the Court's opinion) or the courts will agree with the Commission (in which case the adoption of regulations to codify what the Court holds would be unnecessary)."[62]

That argument is unpersuasive for three reasons. First, not all of the rules

challenged in the Request for Determination were before the *Department of Water and Power* court. Second, since the Energy Commission filed its response in this proceeding, the appeal has been resolved. Third, neither trial nor appellate court addressed the APA compliance issue.

As the Energy Commission itself points out:

> "Although LADWP argued to the [Superior] Court that the Commission's Decision was an invalid underground regulation, the Court ignored this argument and addressed only the merits of the alternative legal theories for and against Commission jurisdiction."

Similarly, while the appellate court determined that the issue of jurisdiction had been properly decided by the lower court; it did not review the validity of the challenged rules under the APA. Contrary to the Energy Commission's view, the need to address that question has been not been obviated by the appellate decision. The fact that the statutory consistency issue has been adjudicated in court does not eliminate the need for OAL to rule on the APA compliance issue.

With the preceding discussion in mind, we look at the challenged Rules 5-8. As stated, Rule 5 specifically pertains to the Harbor Generating Station. In fact, it appears to state a specific exception to Rule 3. Thus, Rule 5 does not have "general" application. On the other hand, the non-specific language used in Rules 6-8[63] makes those rules generally applicable to all existing power facilities in the state.

In summary, OAL finds that rules 2 and 5 do not have general application, whereas rules 1, 3, 4, 6, 7, and 8 are rules of general application. We next determine whether rules 1, 3, 4, 6, 7 and 8 meet the second part of the two-pronged test for a "regulation."

B. Part Two - Do the Challenged Rules Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency or Which Govern the Agency's Procedure?

The Challenged Rules Were Adopted by the Commission

The Commission argues that none of the rules alleged to be "regulations" satisfies the second prong of the two-part test because "none of the alleged 'rules' has been adopted by the Commission." (Emphasis added.)[64] The argument continues: "Only the full Commission has authority to adopt orders, rules, regulations, or to take any legally binding action on behalf of the Commission." (Emphasis added.)[65]

This argument appears to be based on a very literal construction of Government Code section 11342, subdivision (b), which provides in part that a "regulation" is any general rule "adopted" by any agency. OAL must reject this argument. According to the California Supreme Court, literal construction "should not prevail if it is contrary to the legislative intent apparent in the statute." (Emphasis added.)[66] Accepting the Energy Commission argument would emasculate Government Code section 11347.5, the statutory prohibition on agency use of underground regulations. Read in the context of related APA sections, it is apparent that the Commission's construction of section 11342(b) is contrary to legislative intent. Our reasons for arriving at this conclusion are (1) detailed in **1990 OAL Determination No. 7**, which will be quoted below and (2) contained in several appellate opinions, principally *Goleta Valley Community Hospital v. State Department of Health Services*.[67]

In **1990 OAL Determination No. 7**, a tax consulting firm had filed a request for determination with OAL, alleging that a provision of the Board of Equalization's "Audit Manual" violated Government Code section 11347.5. The Board made several arguments in response. One argument was that the challenged provision was not a "regulation" because it had not been "formally adopted by the Board itself." (Emphasis added.)[68] OAL analyzed this contention as follows:

> "The Board's Response characterizes the Audit Manual as merely having been 'written by the staff of the Principal Tax Auditor for use by his staff.'[69] The Response points out that it is the Board, not the audit staff, which has been delegated the duty of administering the Sales and Use Tax law."
>
> "* * * *
>
> "However, the degree to which the Board members are responsible

for or have relied upon the Audit Manual is not determinative as to whether the challenged rule is a standard of general application of the agency. To be a rule of general application of a state agency, a rule need not necessarily be issued, utilized, or enforced by the highest decision-making level of the agency. What is determinative here is that the Board's audit staff clearly used the Audit Manual and particularly the '80% completion rule' as an audit guideline or criterion of general application in auditing taxpayers and in the issuance of 'notices of determination.' The mere issuance of such notices requires taxpayers to either pay taxes due or go through the lengthy, time-consuming, and potentially expensive 'petition for redetermination' process. The use of these Audit Manual provisions by the Board's audit staff alone can have a significant impact upon the taxpaying public, regardless of whether the Board members themselves are responsible for or ultimately rely upon the provisions.

"As stated earlier, Government Code section 11347.5, subdivision (a), clearly provides:

> 'No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ["]regulation["] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.' [Emphasis added.]

"The prohibition of Government Code section 11347.5 is essentially on any agency issuance, utilization or enforcement of a rule not adopted under the A.P.A. The prohibition here is broad, not limited to formal actions of the board members of an agency (where an agency has a board). A rule issued, utilized, or enforced by agency staff also falls within the scope of this prohibition.

"Furthermore, whether the action of a state agency constitutes a 'regulation' hinges largely upon its effect and impact on the public.[70] Clearly the issuance, utilization or enforcement of a rule

by an agency can affect the public regardless of whether the rule evidences itself at the highest level of an agency (such as a board) or at a staff level within an agency. In the situation here at issue, the issuance and utilization of the challenged Audit Manual provision by the Board's audit staff affects the taxpaying public, subjecting taxpayers to the audit assessment and appeal processes, just as actions by the Board members themselves affect the public. This Audit Manual provision clearly is a rule of general application of the agency and has a regulatory effect upon the public, even if the Board members themselves may not be responsible for and do not rely upon the provision.

"* * * *

"Finally, we would note that the Board's narrow view of the scope of the term 'regulation' would have, as its logical consequence, a significant erosion in the applicability of the APA with a resultant decrease in the protections provided by the APA process, including a reduction in the opportunity for public notice and public comment regarding agency rules. The Board argues that an Audit Manual provision is not a 'regulation' of the agency since it is not the Board's rule but rather was only written by the staff of the Board's Principal Tax Auditor for use by the audit staff. Applying this principle to state agencies in general, rules issued and used by state agencies at staff levels (not by the rulemaking body or person with ultimate rulemaking authority) would not be considered 'regulations.' Agencies would be free to issue and use rules at staff levels, potentially with major impacts upon the public, without the protections of the APA process. Clearly this narrow view of the scope of the term 'regulation' and the consequent erosion in the applicability of the APA is contrary to the broad prohibition on agency 'underground rules' contained in Government Code section 11347.5."

There are additional reasons for rejecting the argument that only rules formally adopted by the Commission can potentially violate section 11347.5.

Legislative history records indicate clearly that section 11347.5 was intended to codify the 1978 California Supreme Court decision in *Armistead v. State*

Personnel Board.[71] *Armistead* made clear that APA requirements governing the "exercise of any quasi-legislative power" apply not only to formal policy pronouncements explicitly directed to the public, but also to "house rules" contained in "internal organs of the agency." The *Armistead* Court quoted the 1955 *First Report of the California Senate Interim Committee on Administrative Regulations*, which revealed widespread agency avoidance of APA rulemaking requirements:

> "The manner of avoidance takes many forms, depending on the size of the agency and the type of law being administered, but they can all be briefly described as 'house rules of the agency.'
>
> "They consist of rules of the agency, denominated variedly as 'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins." (Emphasis added.)[72]

The second quoted paragraph from the 1955 legislative committee report contains a list of various creative labels agencies had attached to rules adopted in order to implement statutes. labels including "instructions," "guides," "standards," etc., contained in "manuals," bulletins," etc. The Legislature, in enacting Government Code section 11347.5, unequivocally prohibited agencies from issuing, utilizing, enforcing, or attempting to enforce "any" regulatory enactment, whether contained in "guidelines," "bulletins," "instructions," "manuals," etc.. According to the California Court of Appeal:

> (1) the list of proscribed enactments in Government Code section 11347.5 is "all-inclusive;"[73] and,
>
> (2) Government Code section 11347.5 provides that "anything regulatory is a regulation whether or not so labeled by the agency."[74]

In other words, ". . . if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it."[75]

Two additional appellate opinions help refute the Commission's contention that

rule-like statements in legal briefs, legal opinions, and other documents prepared by lawyers are immune from APA rulemaking requirements. These two opinions reaffirm that statutory interpretations utilized by the agency must in general be adopted according to the APA in order to be legally effective.

First, in *National Elevator Services, Inc. v. Director of Industrial Relations*,[76] a rule interpreting an elevator inspection statute "appears to have found expression only in an internal memorandum of staff counsel." (Emphasis added.)[77] The *National Elevator* Court declined to defer to that interpretation because the interpretation ". . . occurs in an internal memorandum, rather than in an administrative regulation which might be subject to the notice and hearing requirements of proper administrative procedure."

Second, in *Goleta Valley*, a Department of Health Services ("DHS") staff attorney sent a letter containing an interpretation of a duly adopted Medi-Cal regulation to the DHS Chief Hearing Officer. The Court held that this house counsel letter violated Government Code section 11347.5. The Court found that DHS had the power to overrule an earlier interpretation of the underlying Medi-Cal regulation. The Court, however, stated that the new interpretation had been issued in a procedurally invalid fashion.

> The *National Elevator* Court rejected an attempt to establish an official agency interpretation of a statute, an attempt based on an interpretation contained in a staff counsel memorandum. The *Goleta Valley* Court held that a "written interpretation" of an agency regulation contained in a staff counsel letter was promulgated contrary to the APA and was therefore "invalid." Clearly, legal interpretations are not immune from APA compliance simply because they are contained in documents signed by lawyers. Any lingering doubt on this score should be dispelled by a particular APA provision which expressly excludes "rulings" of counsel from two tax agencies.
>
> According to Government Code section 11346, the APA applies to "the exercise of any quasi-legislative power conferred by any statute" except for such exceptions as are both (1) contained in statute and (2) express. An express APA exception involving opinions of counsel is in fact contained in Government Code section 11346, subdivision (b), which provides in part:

> "'Regulation' does not mean or include legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization . . . ." (Emphasis added.)

This exemption only applies to certain statements issued by two particular state agencies. Nothing in section 11342(b) expressly exempts rule-like statements contained in documents prepared by Energy Commission counsel. Had the Legislature intended to confer absolute APA immunity on statements of agency counsel in general or of Energy Commission counsel in particular, it clearly knew what language to use.[78]

Alternatively: for the purposes of our review only, we shall presume that the challenged rules in fact exist.

In a sense, the Commission has denied that any of the challenged rules in fact exists. We cannot, however, ignore the possibility that the enunciated rules--. as attested to by the Requester under penalty of perjury--are in fact utilized by representatives of the Commission in dealings with the regulated public, in lieu of duly adopted regulations. Accordingly, for purposes of our review only, we shall presume that the challenged rules exist.[79]

Rule 1 does more than simply restate statutory provisions

The Energy Commission asserts that Rule 1 does not interpret, implement or make specific the law because that rule only restates and paraphrases Public Resources Code sections 25500, 25110, and 25120 (quoted above). In **1988 OAL Determination No. 15**,[80] we stated:

> "In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and 'its application.' Such an enactment is simply 'administrative' [or 'ministerial'] in nature, rather than 'quasi-judicial' or 'quasi-legislative.'
>
> "If, however, the agency makes new law, i.e., supplements or 'interprets' a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power. Quasi-legislative power is conferred by statute, either expressly or

impliedly.[81]

"'In rulemaking, an agency is often free to interpret a statute or another regulation in such a way as to impose an additional requirement on the regulated public. By contrast, in applying a statute or regulation, an agency has much less latitude.' [Emphasis added.][82]

"Fundamental to the issue of whether or not provisions contained in the challenged documents supplement or interpret the law enforced or administered by the agency, is whether or not the law involved needs such further supplementation or interpretation. In a previous Determination we stated:

> "'If a rule simply applies an existing constitutional, statutory or regulatory requirement that has only one legally tenable "interpretation," that rule is not quasi-legislative in nature--no new "law" is created.'[83] [Emphasis added.]"[84,85]

We agree that the challenged rule would not constitute a "regulation" if it were merely a restatement of law or the only tenable interpretation of the law. Rule 1, however, cannot be characterized as such. In *Department of Water and Power*,[86] the trial court (which was affirmed by the Court of Appeal) provided another tenable interpretation of the law, stating:

> "The 'construction of any facility' basis for jurisdiction can be read to apply only to construction of a new, previously non-existing facility . . . ." [Emphasis in original.]

This reading of Public Resources Code section 25500 differs from Rule 1 in that it narrows the scope of the Energy Commission's jurisdiction.

With respect to Rules 1, 3, 4, 6, 7, and 8, there is no doubt that these rules interpret, implement and make specific the law governing the Energy Commission's jurisdiction over the certification of power facilities.

Analysis under the two-part test leads us to conclude that the Rules 1, 3,

4, 6, 7, and 8 of the challenged rules are "regulations" within the meaning of the key provision of Government Code section 11342, subdivision (b).

D.

The challenged interpretations found to constitute "regulations" are not statutorily exempt from compliance with APA requirements.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.[87] However, rules concerning certain activities of state agencies--e.g., "internal management"--are not subject to the procedural requirements of the APA.[88]

The issue of the applicability of exceptions to the APA requirements was not raised by either the Requester or the Energy Commission. Our independent review discloses no applicable exceptions.

Having found certain challenged rules to be "regulations" and not exempt from the requirements of the APA, we conclude that those rules violate Government Code section 11347.5, subdivision (a).

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the Energy Commission's quasi-legislative enactments are generally subject to the APA;

(2) the Energy Commission's case-by-case adjudication of the jurisdictional issue does not constitute a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) of the eight enumerated challenged rules, Rules 2 and 5 do not constitute "regulations," while Rules 1, 3, 4, 6, 7, and 8, do

constitute "regulations;"

(4) no exceptions to the APA requirements apply;

(5) the challenged rules which constitute "regulations" violate Government Code section 11347.5, subdivision (a).

DATE: April 6, 1993

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1. This Request for Determination was filed by Jerry Jordan, Executive Director, California Municipal Utilities Association, 1225 Eighth Street, Suite 440, Sacramento, CA 95814, (916) 441-1733. The State Energy Resources Conservation and Development Commission was represented by Steven M. Cohn, Deputy General Counsel, 1516 Ninth Street, Sacramento CA 95814-5512, (916) 324-3248.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "1." (This determination is the first published in 1993.) Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

This determination may be cited as "**1993 OAL Determination No. 1** (Energy Commission)."

2. Staff Counsel Mathew Chan prepared the first draft of this determination; Senior Staff Counsel Michael McNamer prepared the second draft. Herbert Bolz prepared the third and final draft.

3. The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket

No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

In January 1992, a fourth survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

Authorities discovered since fourth survey

One case and one statute underscore the basic principle that all state agency rules which meet the statutory definition of "regulation" must either be (1) expressly exempted by statute or (2) adopted pursuant to the Administrative Procedure Act and printed in the California Code of Regulations. In *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 3 Cal.Rptr.2d 264, review denied, the California Court of Appeal, Third District, held that state textbook selection guidelines were "regulations" which had to be adopted in compliance with the APA. In *Engelmann*, the Third District expressly overruled its 1973 decision in *American Friends Service Committee v. Procunier* insofar as the 1973 decision suggested that "specific" provisions in agency enabling acts could be held to control over the "general" APA (Government Code section 11346). In section 11346, the Court noted, there is an express basis for applying the APA to every other statute.

The second recent development is the legislative response to 1990 OAL Determination No. 12, which concluded that certain rules issued by the Department of Finance violated the APA. In urgency legislation (SB 327/1991), the Legislature expressly exempted such Department of Finance rules from APA rulemaking requirements. See Government Code section 11342.5.

Third, in *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition)* (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25, rehearing denied, Feb. 19, 1993, the California Court of Appeal upheld **1989 OAL Determination No. 4**, which found that regulatory portions of regional water quality control plans (or "basin plans") were subject to the APA. Fourth, in *Department of Water and Power v. State of California Energy Resources and Conservation Commission* (1991) 2 Cal.App.4th 206, 3 Cal.Rptr.2d 289, 301, the

Court found the challenged interpretations inconsistent with the statute, avoiding the APA compliance issue.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

4. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless
>
> (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
>
> (2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

5. According to Government Code section 11370:

> "Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the Administrative Procedure Act." (Emphasis added.)

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL regulations are both reprinted and indexed in the annual APA/OAL regulations booklet "**California Rulemaking Law**," which is available from OAL (916-323-6225). The February 1993 revision is $3.50 ($5.80 if sent U.S. Mail).

6. OAL Determinations Entitled to Great Weight In Court

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion, stating that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed

it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

7. Note Concerning Comments and Responses

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response."

If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

8. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11347.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) Of course, an agency rule found to violate the APA could also simply be rescinded.

9. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

10. Government Code section 11347.5 provides:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (b) of Section

11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

"1. File its determination upon issuance with the Secretary of State.

"2. Make its determination known to the agency, the Governor, and the Legislature.

"3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

"4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

"1. The court or administrative agency proceeding involves the party that sought the determination from the office.

"2. The proceeding began prior to the party's request for the

office's determination.

"3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation[*] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

11. Grier v. Kizer (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249, review denied.

12. Public Resources Code sections 25000-25986.

13. Cal. P. U. C. v. Cal. Energy Res. Conservation (1984) 150 Cal.App.3d 437, 440, 197 Cal.Rptr. 866, 869.

14. OAL does not review alleged underground regulations for compliance with APA's six substantive standards

We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. (Of course, as discussed in the text of the determination, the APA itself applies to all Executive Branch agencies, absent an express statutory *exemption*.) If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. Public Resources Code section 21080.5, subdivision (e), states:

> "The Secretary of Resources Agency shall certify a regulatory program which the secretary determines meets all the qualifications for certification set forth in this section, and withdraw certification on determination that the regulatory program has been altered so that it no longer meets those qualifications. Certification and withdrawal of certification shall occur only after compliance with [the APA]." [Emphasis added.]

16. California Regulatory Notice Register 91, No. 4-Z, January 25, 1991, p. 189.

17. (1991) 2 Cal.App.4th 206, 3 Cal.Rptr. 289.

18. Response, p. 3, citing CCR, tit. 20, sec. 1935, subsec. (b).

19. The Requester points out:

> "the CEC commenced a rulemaking procedure on the 50 MW jurisdictional limit in 1986, but the effort was ultimately abandoned. Regulations proposed in July, 1987 and July, 1988 would have defined Commission standards relating to aggregation for jurisdictional purposes . . . The Commission failed to complete any of these proceedings." (Request, p. 3, fn. 1.)

(Also see, Response, p. 7.)

20. "All statutory references are to the Public Resources Code unless otherwise indicated." [Footnote 5 in original.]

21. "'One member of the commission shall have a background in the field of engineering or physical science and have knowledge of energy supply or conversion systems; one member shall be an attorney and a member of the State Bar of California with administrative law experience; one member shall have background and experience in the field of environmental protection or the study of ecosystems; one member shall be an economist with background and experience in the field of natural resource management; and one member shall be from the public at large.' (Sec. 25201.)" (Footnote 6 in original.)

22. "A '"site" [is] means any location on which a facility is constructed or is proposed to be constructed.' (Sec. 25119.)" [Footnote 7 in original.]

23. "A '"facility" [is] any electric transmission line or thermal powerplant, or both electric transmission line and thermal powerplant, regulated according to the provisions of this division.' (Sec. 25110.) A '"thermal powerplant" [is] any stationary or floating electrical generating facility using any source of thermal energy, with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto . . . .' (Sec. 25120.)" [Footnote 8 in original.]

24. "'Construction' does not include 'the installation of environmental monitoring equipment,' a 'soil or geological investigation,' a 'topographical survey,' 'any other study or investigation to determine the environmental acceptability or feasibility of the use of the site for any particular facility,' or 'any work to provide access to a site for any of the [above] purposes . . . .' (Sec. 25105, subds. (a)-(d).) [Footnote 9 in original.]"

25. (1991) 2 Cal.App.4th 206, 214-15, 3 Cal.Rptr.2d 289, 292-3, review denied.

26. Id at p. 298.

27. Id, at pp. 290-291.

28. Id. at p. 297.

29. Id., at 297 ***

30. Id., at 299***

31. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco

Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

1989 OAL Determination No. 4 was upheld by the California Court of Appeal in State Water Resources Control Board v. Office of Administrative Law (1993) 12 Cal.App.4th 697, 16 Cal.Rptr. 2d 25, rehearing denied, Feb. 19, 1993.

32. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746- 747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

33. Response, p. 3, fn. 4.

34. Response, p. 13.

35. Fox, Understanding Administrative Law (1986), p. 111.

36. See for example Asimow, California Underground Regulations (1992) 44 Administrative Law Review 43, 45; Bonfield, State Administrative Policy Formulation and the Choice of Lawmaking Methodology (1990) 42 Administrative Law Review 121, 122-136; Fox, Understanding Administrative Law (1986) p. 113; Davis, Administrative Law Treatise (second printing, 1979) p. 617.

37. SB 824 (1947/DeLap) initially provided that public contracts were exempt from the APA. This provision was amended out, and then SB 824 died in committee. A competing bill, AB 35, which did not exempt public contracts from the APA, was approved by the Legislature and chaptered as 1947, ch. 1425.

38. Fox, Understanding Administrative Law (1986), pp. 10-11.

39. 332 U.S. 194, 203.

40. "Federal agencies often have considerable discretion under federal law to use either formal rulemaking or ad hoc adjudication to formulate rules oriented toward future decisions. Despite sharp criticism, the U.S. Supreme Court has not abandoned this

principle. Though this principle of federal administrative law has been quoted in some recent California judicial dicta, research has failed, with one predictable exception, to disclose any published California appellate court opinion in which the principle has been specifically relied on to uphold an uncodified agency rule. That exception allows an agency to establish a particular interpretation of a statute or regulation by obtaining judicial approval, normally in a published appellate opinion. . . . .

"Notwithstanding the argument that agency discretion to use administrative adjudication to formulate future-oriented rules has been established in California case law, it is likely that any such principle has not survived the 1983 enactment of Gov. Code § 11347.5. That section prohibits state agencies from relying in any way on uncodified rules that modify or supplement duly adopted provisions of law, unless the rule has been adopted as a regulation pursuant to the California APA. Further, Gov. Code § 11346 provides that California APA rulemaking requirements apply to all exercises of quasi-legislative power, and that any modifications to California APA requirements must be expressly stated in other legislation. No statutes have been found that expressly authorize agencies to elect to forego formal rulemaking in favor of case-by-case administrative adjudication as a means of creating rules to implement statutes administered by the agency. . . ." (1 Cal. Public Agency Prac. § 20.06[3]; footnotes omitted; emphasis added.)

41. 31 Cal.3d at 475, 183 Cal.Rptr at 233 (footnote omitted).

42. Government Code section 11346 provides:

> "It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." (Emphasis added.)

43. (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104, 111.

44. An example of a quasi-legislative action is an agency policy statement defining a statutory term. For instance, OAL defined the statutory term "determination" in Title 1, CCR, subsection 121(a), one of the regulations adopted by OAL to implement Government Code section 11347.5.

Examples of uncodified quasi-legislative actions include:

(1) Assessors' Handbook: "Welfare Exemption" AH 267 of the State Board of Equalization (disallowing the property tax exemption for religious property used for residential purposes), found to be an underground regulation in 1990 OAL Determination No. 9 [Docket No. 89-015], California Regulatory Notice Register 90, No. 22-Z, June 1, 1990, p. 842, and,

(2) Portions of the Driver Safety Manual of the Department of Motor Vehicles (such as requirements pertaining to applicants for traffic safety school instructor licenses), found to be underground regulations in 1987 OAL Determination No. 17 [Docket No. 87-006], California Regulatory Notice Register 88, No. 1-Z, January 1, 1988, p. 88.

OAL's experience is that virtually all agency rules which are found pursuant to Government Code section 11342, subdivision (b), to be "regulations" are also quasi-legislative in nature. A rule is a "regulation" if it is (1) a general rule (2) adopted by the agency to implement, interpret, or make specific a law enforced or administered by it. The first element of the quoted Pacific Legal Foundation test also addresses the question of whether the enactment under review is a general rule. OAL has yet to encounter a general rule which was not intended to govern future decisions. Accordingly, a rule found to be a "regulation" within the meaning of the APA will almost always also be found to be "quasi-legislative" in nature.

45. We do not intend to include within the scope of the word "interpret" (see Government Code section 11342(b) those situations in which the statutory term has only one legally tenable interpretation.[c/r to only tenable fn.] ***Though the statutory definition of "regulation" contains the unqualified term "interpret," it would be inconsistent with the obvious intent of the APA as a whole to read this word "interpret" literally, e.g., to assert that an agency must turn around and adopt by regulation a clear and unambiguous statutory requirement.

46. Response, p. 10.

47. Response, p. 16.

48. The Energy Commission denies, however, that all jurisdictional questions will be decided on a case-by-case basis. (Response, p. 3; citing to its regulation section 1935 on the subject of "generating capacity.")

49. Response, p. 3.

50. In **1987 OAL Determination No. 10** (Department of Health Services), we rejected a similar argument in note 8. Determination not published in Notice Register; copy available from OAL

51. We point out that the circumstances presented in this Determination differ completely from that situation in which an agency applies a general policy on a case-by-case basis.

> "As stated in California Coastal Farms v. Agricultural Labor Relations Board [(1980) 111 Cal.App.3d 734, 739, 168 Cal.Rptr. 838], pure case-by-case determinations do not involve the implementation of an [sic] general policy by ad hoc means. . . . The practice of pure case-by-case determination must be distinguished from the much different situation in which the agency announces a rule of general applicability without first publishing that rule in the California Code of Regulations, and then proceeds to enforce the rule [in specific situations]. . . . In short, an agency need not develop a general rule to cover a problem left unresolved in pertinent codified law, but if it does have such a general rule (possibly developed through administrative adjudication), this rule must be formally adopted pursuant to the California APA absent an express statutory exception from California APA requirements." [1 Cal. Public Agency Prac. § 20.06[2][c]; emphasis added; footnotes omitted.]

52. The Energy Commission states on page 12 of its Response:

> "CMUA's fundamental problem with the Energy Commission is not that the Commission is adopting illegal underground regulations, but rather that the Commission has not adopted rules, underground or otherwise, that interpret its governing statutes as narrowly as CMUA would like to have them interpreted. CMUA seems to believe that whenever a regulatee proposes its own self-serving interpretation of a statute, an administrative agency is not entitled to disagree unless it commences a formal rulemaking proceeding and adopts a regulation setting forth an alternative interpretation."

53. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.

54. The history note to Chapter 5 ("Administrative Adjudication," sections 11500 et seq.; emphasis added) of Title 2, Division 3, of the Government Code, contained in West's annotated codes, reveals that Chapter 5 was originally added under the heading "Administrative Procedure." (Emphasis added.) Thus, the word

"procedure" as used in Government Code section 11342(b) would at a minimum appear to encompass the types of rules governing administrative adjudication (i.e., administrative hearings on such matters as license revocation) that are found in Chapter 5.

55. Supra, 219 Cal.App.3d at p. 438, 268 Cal.Rptr. at p. 253.

56. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

57. Request, p. 4.

58. Administrative Law and Practice, Vol. 1, Charles H. Koch Jr., § 2.3, 1992 Pocket Part, pp. 20-21.

59. In the Matter of Los Angeles Department of Water and Power's Harbor Generating Station Repowering Project, Docket No. 89-C&I-3, July 1990, Publication No. P800-90-001.

60. DWP's Public Comment, pp. 3-4.

61. An excerpt from the trial transcript contains a passage in which counsel for the Commission states in essence that Commission jurisdiction over the Harbor conversion was necessary in case the utility sought to install a nuclear generator in the place of the existing gas fire generator. (Attachment to Department of Water and Power's comment dated Feb. 22, 1991.)

62. Response, p. 10.

63. The specific numbers of megawatts used in Rule 7 merely reflect the use of an example and does not restrict application of that rule.

64. Response, p. 10.

65. Response, p. 11.

66. Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115.

67. (1984) 149 Cal.App.3d 1124, 197 Cal.Rptr. 294.

68. CRNR 90, No. 14-Z, April 6, 1990, p. 542, __; typewritten version, pp. 183-86.

69. Board Response, p. 6.

70. See, for example, Winzler & Kelly v. Department of Industrial Relations (1981), 121 Cal.App. 3d 120, 128, 174 Cal.Rptr. 744, 747.

71. 22 Cal.3d 198, 149 Cal.Rptr. 1.

72. 22 Cal.3d 205, 149 Cal.Rptr. 4.

73. *Stoneham v. Rushen* II, 156 Cal.App. at 309, 203 Cal.Rptr. at 25.

74. *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Coalition)* (1993) 16 Cal.Rptr.2d at 28.

75. Id.

76. (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165.

77. 136 Cal.App.3d at 142, 186 Cal.Rptr. at 172.

78. We note that the Model APA exempts opinions of the state attorney general (***_____); the California APA does not do so.

79. We stated in **1990 OAL Determination No. 16** (Department of Personnel Administration, December 18, 1990, Docket No. 89-023), CRNR 91, No. 1-Z, p. 40:

> "It is important to emphasize that our focus is on the rule as alleged. It is not our function to make factual determinations regarding the existence and scope of the alleged rule, but only to determine whether the rule as alleged violates Government Code section 11347.5." (Typewritten version, p. 492; emphasis added.)

Accordingly, as an *alternative* basis for addressing the CEC's contention, OAL states that this Determination is not intended to, and does not, resolve the issue of whether the challenged rules have in fact been utilized as set out in the Request for Determination.

80. **1988 OAL Determination No. 15** (State Water Resources Control Board, September 2, 1988, Docket No. 87-021), California Regulatory Notice Register 88-Z, September 16, 1988, p. 3004.

81. **1986 OAL Determination No. 8** (Department of Food and Agriculture, October 15, 1986, Docket No. 86-004), California Administrative Notice Register 86, No. 41-Z, October 31, 1986, p. B-21; Government Code section 11342.2; Title 1, California Code of Regulations, section 14(a)(2).

82. **1986 OAL Determination No. 2** (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, p. B-31; typewritten version, p. 9.

83. **1986 OAL Determination No. 4** (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.

84. Bracketed notes appear in **1986 OAL Determination No. 15.**

85. See also Grier v. Kizer, supra, 219 Cal.App.3d at 438-39; 268 Cal.Rptr. at 254; Engelmann v. State Board of Education (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274-75. The National Elevator court rejected an uncodified agency interpretation of Labor Code section 7309 as "untenable," as not "justified by the legislative language or legislative history. . . ." 136 Cal.App.3d at 138; 186 Cal.Rptr. at 169. The "only legally tenable" interpretation concept is discussed in Respondent's Brief dated May 5, 1992, pp. 36-41 in State Water Resources Control Board v. Office of Administrative Law, California Court of Appeal, First Appellate District, Division One, Case No. AO54559.

86. Superior Court of California, County of Los Angeles, Case no. BS 003 230.

87. Government Code section 11346.

88. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6**, CRNR, 91, No. 43-Z, p. 1451, pp.***; typewritten version, pp. 175-177. Like Grier v. Kizer, **1991 OAL Determination No. 6** rejected the idea that City of San Joaquin (cited above in this note) was still good law.

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The annual Determinations Index is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814-4602, (916) 323-6225, CALNET 8-473-6225. The price of the latest version of the Index is available upon request. Two indexes are currently available. One covers calendar years 1986-88, the second covers 1989 and 1990. The 1991-1992 index should be available in mid-April 1993. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $162.

Though the Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.